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ESP Synergy Sdn Bhd v KB Enviro Sdn Bhd

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HIGH COURT (JOHOR BAHRU) — CIVIL SUIT NO 22NCVC-6–01 OF 2015
MOHD NAZLAN J
18 OCTOBER 2017

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Civil Procedure — Amendment — Statement of claim — Application for — Whether parties bound to pleadings — Whether application within court discretion — Whether time affected application — Whether amendment on bad faith or caused injustice to parties — Rules of Court 2012 O 20 r 5

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The plaintiff and the defendant, both private limited companies, had entered into a joint venture agreement dated 22 April 2011 ('the JVA') where the parties agreed that the defendant would lease a certain part of a land ('the land') and the plaintiff would build and own a slop oil treatment facility on the land, with the profits from the sale of the processed slop oil, after deducting operating costs, to be shared on the basis of 70% be distributed to the plaintiff, and 30% to the defendant. Quite early on, during the case of the plaintiff, at the stage when the first witness was giving evidence, the counsel for the plaintiff started asking the witness questions which basically focused on the contention of the plaintiff that the defendant had failed to supply slop oil to the plaintiff in violation of the JVA. The counsel for the defendant objected to this line of questioning, arguing that the issue was not pleaded. The objection was recorded, and the parties were instructed to submit on the issue after the conclusion of the trial. The questions revolving on the allegation that the defendant failed to supply slop oil to the plaintiff (in addition to a whole lot of other questions) continued to be asked by the counsel for the plaintiff of virtually all the other witnesses of both plaintiff and the defendant. Their answers were in evidence. The counsel for the defendant continued raising her objections, almost every time when this occurred. And the judge maintained the same approach of asking parties to submit on the matter at the end of trial. When the court was hearing evidence of the final witness for the defendant, the plaintiff filed this encl 88 seeking leave to amend its statement of claim pursuant to O 20 r 5 of the Rules of Court 2012, primarily, to expressly include the pleading that the defendant failed to supply the slop oil to the plaintiff. The other proposed amendments were in respect of stating the tenure of the tenancy agreement between the defendant and the landlord of the land, with the pleading that the defendant had leased the land to the plaintiff beyond the period the defendant was entitled to. The defendant contested this application.

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Held, allowing the plaintiff's application in part:

(1) It could not be emphasised enough that parties were bound by their pleadings and any departure must be accompanied by an amendment to the original pleadings. Thus, if the amendment application was allowed, the objection against the need to adhere to matters specifically pleaded would fall away, since the pleadings would be amended to include such matters previously unpleaded (see para 17).

(2) In the present case, there was absolutely no issue of the amendment application delaying the trial for it had started and even concluded. Thus, in the circumstances of the case, the factor of time of application alone could not, even in the absent of a cogent reason for the delay in making the application, without more, be a basis to decline the request, unless mala fide was shown. But none was shown by the defendant (see paras 25–26).

(3) It would not be in the interest of justice that the true issue of controversy was disregarded by the court only on account of it being unpleaded as alleged by the defendant. Even though the issue was not specifically stated in the list of issues to be tried filed by the parties, the issue had in fact been raised and dealt with extensively by the answers given by most of the witnesses. Even without a pleading on that specific clause, the thrust of the obligations of the defendant in the JVA included its alleged duty to deliver slop oil, which was the very subject matter of slop treatment facility business envisaged in the JVA. There was no new cause of action. There was no transformation of the character of the suit. It was still very much about the alleged breach of the JVA. The JVA itself had been specifically pleaded. Neither had bad faith been shown. The tardiness of the plaintiff in moving this application was far from laudatory. But this did not, without more, amount to bad faith (see paras 30 & 33).

[Bahasa Malaysia summary

Plaintif dan responden, kedua-duanya merupakan syarikat milikan persendirian, telah memasuki satu perjanjian usaha sama bertarikh 22 April 2011 ('perjanjian tersebut'). Dalam perjanjian tersebut, kedua-dua pihak bersetuju yang mana defendan akan membuat sewaan untuk beberapa bahagian tanah ('tanah tersebut') manakala plaintif pula akan membina dan memiliki kemudahan rawatan sisa minyak di kawasan tanah tersebut. Hasil keuntungan daripada jualan sisa minyak yang telah diproses tersebut akan dibahagikan pada kadar 70% kepada plaintif dan 30% kepada defendan. Semasa kes plaintif, ketika saksi pertama memberikan keterangan, peguam plaintif telah menyoal saksi berkenaan dengan isu kegagalan defendan membekalkan sisa minyak kepada plaintif. Keadaan ini telah bertentangan dengan perjanjian tersebut. Peguam defendan kemudian membantah persoalan yang dikemukakan oleh plaintif dengan alasan isu tersebut tiada dalam pliding. Persoalan tentang kegagalan defendan membekalkan sisa minyak kepada plaintif terus dibangkitkan oleh peguam plaintif kepada

saksi-saksi plaintif dan defendan yang lain. Jawapan balas terhadap persoalan tersebut terkandung dalam keterangan-keterangan saksi. Peguam defendan membantah setiap kali persoalan ini dibangkitkan. Hakim berpegang kepada prinsip agar kedua-dua pihak plaintif dan defendan untuk menyerahkan isu-isu tersebut ketika akhir perbicaraan. Semasa mahkamah mendengar keterangan saksi terakhir defendan, plaintif telah mengfailkan lampiran 88 memohon pada mahkamah untuk membuat pindaan kepada pernyataan tuntuan di bawah A 20 k 5 Kaedah-Kaedah Mahkamah 2012. Pindaan tersebut dibuat bagi memasukkan isu defendan gagal membekalkan sisa minyak kepada plaintif. Pindaan-pindaan lagi termasuklah berkenaaan dengan tempoh sewaan di antara defendan dan pemilik tanah tersebut, dengan pliding pindaan mengatakan bahawa defendan telah menyewa tanah tersebut melebihi masa yang ditetapkan.

Diputuskan, membenarkan sebahagian permohonan plaintif:

(1) Adalah tidak boleh dinafikan bahawa pihak-pihak adalah terikat pada pliding dan sebarang pindaan mestilah berdasarkan pada pliding-pliding asal. Oleh itu, sekiranya pindaan pliding dibenarkan dan bantahan pada pindaan pliding tersebut ditolak, pliding akan dipinda untuk memasukkan perkara-perkara yang sebelum ini tidak diplidkan (lihat perenggan 17).

(2) Dalam kes semasa, adalah tidak menjadi satu isu di mana permohonan pindaan pliding telah menangguhkan masa perbicaraan. Perbicaraan telah pun bermula dan berakhir. Oleh itu, berdasarkan dapatan fakta kes, faktor masa permohonan pindaan ini dibuat tidak boleh dijadikan satu-satunya alasan untuk menolak permohonan pindaan, melainkan adanya unsur mala fide. Tetapi, dalam kes semasa, tiada unsur mala fide oleh defendan (lihat perenggan 25–26).

(3) Adalah tidak menjadi satu kepentingan keadilan sekiranya mahkamah menolak permohonan plaintif hanya kerana perkara tersebut tiada dalam pliding. Walaupun isu yang berbangkit tersebut tidak dinyatakan secara spesifik dalam isu-isu untuk dibicarakan sepertimana yang telah difailkan oleh pihak-pihak, isu tersebut telahpun dibangkitkan dan dihujahkan secara terus- menerus melalui keterangan-keterangan kebanyakkan saksi. Walaupun tanpa ada apa-apa pliding secara spesifik mengenai kegagalan defendan membekalkan sisa minyak, adalah menjadi tanggungjawab defendan untuk berbuat demikian sepertimana yang telah dipersetujui dalam perjanjian usaha sama. Pindaaan ini tidak menyebabkan adanya kausa tindakan yang baru dan perubahan pada permohonan yang dibuat oleh plaintif. Perjanjian usaha sama tersebut telahpun diplidkan. Tiada apa-apa niat jahat ditunjukkan oleh plaintif dan permohonan ini tidak menunjukkan apa-apa niat jahat plaintif kepada defendan (lihat perenggan 30 & 33).]

Notes

For cases on statement of claim, 2(1) *Mallal's Digest* (5th Ed, 2017 Reissue) paras 744–769.

Cases referred to

Bumiputra-Commerce Bank Berhad and others v Bumi Warna Indah Sdn Bhd [2004] MLJU 529; [2004] 4 CLJ 825, HC (refd)

Giga Engineering & Construction Sdn Bhd v Yip Chee Seng & Sons Sdn Bhd & Anor [2015] 6 MLJ 449; [2015] 9 CLJ 537, FC (refd)

Hong Leong Finance Bhd v Low Thiam Hoe and another appeal [2016] 1 MLJ 301, FC (folld)

KEP Mohamed Ali v KEP Mohamed Ismail [1981] 2 MLJ 10, FC (refd)

Karuppannan a/l Ramasamy & Anor v Elizabeth Jeevamalar Ponnampalam & Ors (Sundaram a/l Marappa Goundan & Anor, interveners and Raya Realti, third party) and another appeal [2010] 1 MLJ 156, FC (refd)

Pfizer Ireland Pharmaceuticals v Ranbaxy (M) Sdn Bhd [2013] 3 MLJ 703; [2013] 2 CLJ 61, CA (refd)

Samuel Naik Siang Ting v Public Bank Bhd [2015] 6 MLJ 1; [2015] 8 CLJ 944, FC (refd)

Suhaili bin Ismail v Syarikat Sribima Sdn Bhd [2015] 6 MLJ 556, CA (refd)

Yamaha Motor Co Ltd v Yamaha Malaysia Sdn Bhd & Ors [1983] 1 MLJ 213, FC (refd)

Yew Wan Leong v Lai Kok Chye [1990] 2 MLJ 152, SC (refd)

Legislation referred to

Rules of Court 2012 O 18, O 20 r 5, 5(1), O 34, O 34 r 1(1), O 92 r 4

M Johnson (Zain Johnson & Assoc) for the plaintiff.
Lam Wai Tze (Lam Wai Tze & Co) for the defendant.

Mohd Nazlan J:

INTRODUCTION

[1] This is an application by the plaintiff, documented in encl 88, filed during trial to amend its statement of claim. I heard the application after the conclusion of trial an d allowed the same, and highlighted my primary reasons for the decision. This judgment contains the full reasons for my decision.

KEY BACKGROUND FACTS

[2] The plaintiff and the defendant, both private limited companies, had entered into a joint venture agreement dated 22 April 2011 ('the JVA') where the parties agreed that the defendant would lease a certain part of a land ('the land') and the plaintiff would build and own a slop oil treatment facility on the

land, with the profits from the sale of the processed slop oil, after deducting operating costs, to be shared on the basis of 70% be distributed to the plaintiff, and 30% to the defendant.

[3] Following a dispute, the plaintiff initiated the present writ action, which is resisted by the defendant. Trial commenced in Johor Bahru (since the suit was filed thereat) and continued to be heard by me in Kuala Lumpur following my transfer and upon the request by parties. The plaintiff called 11 witnesses and the defendant 4. The plaintiff opened its case on 26 August 2015 and the defendant closed on 29 May 2017. The trial took 30 days in total.

[4] Quite early on, during the case of the plaintiff, at the stage when the first witness was giving evidence, the counsel for the plaintiff started asking the witness questions which basically focussed on the contention of the plaintiff that the defendant had failed to supply slop oil to the plaintiff in violation of the JVA. The counsel for the defendant objected to this line of questioning, arguing that the issue was not pleaded. I recorded the objection but allowed the counsel for the plaintiff to proceed, instructing the parties to submit on the issue after the conclusion of the trial.

[5] The questions revolving on the allegation that the defendant failed to supply slop oil to the plaintiff (in addition to a whole lot of other questions) continued to be asked by the counsel for the plaintiff of virtually all the other witnesses of both plaintiff and the defendant. Their answers are in evidence. The counsel for the defendant continued raising her objections, almost every time when this occurred. And I maintained the same approach of asking parties to submit on the matter at the end of trial.

[6] When the court was hearing evidence of the final witness for the defendant, the plaintiff filed this encl 88 seeking leave to amend its statement of claim, primarily, to expressly include the pleading that the defendant failed to supply the slop oil to the plaintiff. The other proposed amendments are in respect of stating the tenure of the tenancy agreement between the defendant and the landlord of the land, with the pleading that the defendant had leased the land to the plaintiff beyond the period the defendant was entitled to. The defendant contested this application. Hence, the proceedings before me.

ESSENCE OF CONTENTIONS OF PARTIES

[7] The grounds stated by the plaintiff in its notice of application in support of the amendment request are fourfold. First, the amendments were necessary to strengthen the overall claim of the plaintiff; secondly, they were imperative to provide a true picture of the claim in the interest of justice; thirdly, the plaintiff would be prejudiced if the amendments were not allowed; and

fourthly, the same was made bona fide with no prejudice to the defendant.

[8] The defendant argued that the application was not made in good faith as it was not only filed towards the end of the defendant's case when it could have been made much earlier but that the plaintiff should also have sought the amendment when the issue was first raised by the plaintiff and objected to by the defendant.

[9] The defendant asserted that the application was an afterthought, since the plaintiff has now realised that it would be unable to prove its original pleaded case as contained in the statement of claim. Instead, contrary to established rules on pleading, the plaintiff is presently attempting to amend its claim to suit the new and unpleaded facts and issues introduced by the plaintiff during trial.

EVALUATION AND FINDING OF THIS COURT

The law

[10] The application is made pursuant to O 20 r 5 and O 92 r 4 of the Rules of Court 2012 ('the RC 2012'). The latter concerns the inherent jurisdiction of the courts. The focus of this application is essentially on O 20 r 5(1) which states as follows:

> Subject to Order 15, rules 6, 6A, 7 and 8 and the following provisions of this rule, the Court *may at any stage of the proceedings* allow the plaintiff to amend his writ, or any party to amend his pleading, on such terms as to costs or otherwise as may be just and in such manner, if any, as it may direct. (Emphasis added.)

[11] The plaintiff placed much reliance on the fact that the rule permits amendments to be made at any stage of the proceedings. It also referred to the decision of the High Court in *Bumiputra-Commerce Bank Berhad and others v Bumi Warna Indah Sdn Bhd* [2004] MLJU 529; [2004] 4 CLJ 825 which held that amendments to pleadings could be made at any stage from before trial and even during appeal of the suit which has concluded. More recently, the Court of Appeal in *Suhaili bin Ismail v Syarikat Sribima Sdn Bhd* [2015] 6 MLJ 556 affirmed the rule that amendments to pleadings could be sought at any stage of the proceedings, including after the close of pleadings.

[12] As readily pointed out by the defendant, it is settled law that it is not the function of the court to build a case for the parties inconsistent with their pleaded case. This is the 'gold standard' in pleading rules and evidence, as pronounced by the Supreme Court in *Yew Wan Leong v Lai Kok Chye* [1990] 2 MLJ 152, in the following terms:

It is not the duty of the court to make out a case for one of the parties when the party concerned does not raise or wish to raise the point. In disposing of a suit or matter involving a disputed question of fact, it is not proper for the court to displace the case made by a party in its pleadings and give effect to an entirely new case which the party had not made out in its own pleadings. The trial of a suit should be confined to the pleas on which the parties are at variance.

[13] I think it is manifest that the court may allow amendment to pleadings at any stage of the proceedings, even after the conclusion of trial, like the case presently before me. The issue is whether the court should exercise its discretion to do so.

[14] In that context, the defendant's argument that parties are bound by their pleadings, which of course is a fundamental rule in civil litigation, is not exactly the real issue for determination before me since the plaintiff has applied to make amendments to the pleadings.

[15] I need to refer only to two Federal Court decisions on the importance of pleadings. In *Giga Engineering & Construction Sdn Bhd v Yip Chee Seng & Sons Sdn Bhd & Anor* [2015] 6 MLJ 449; [2015] 9 CLJ 537, Richard Malanjum CJ (Sabah and Sarawak) held thus:

[42] Now, it is trite law that the plaintiff is bound by its own pleadings (see *R Rama Chandran v The Industrial Court of Malaysia & Anor* [1997] 1 MLJ 145; [1997] 1 CLJ 147; *Anjalai Ammal & Anor v Abdul Kareem* [1969] 1 MLJ 22; [1968] 1 LNS 8; *Gimstern Corporation (M) Sdn Bhd & Anor v Global Insurance Co Sdn Bhd* [1987] 1 MLJ 302; [1987] 1 CLJ 123; [1987] CLJ Rep 102 (SC); *Joo Chin Kia v Loh Seng Tek* [1987] 1 CLJ 194; [1987] CLJ Rep 662; and *KEP Mohamed Ali v KEP Mohamed Ismail* [1981] 2 MLJ 10; [1980] 1 LNS 169 (FC)). The plaintiff is not permitted to improve its pleading in any other manner *other than by way of an application to amend.* Otherwise it would be unfair and prejudicial to the defendants if the plaintiff could now be allowed to raise an issue that was not within the contemplation of the parties in the first place. (See *Esso Petroleum Co Ltd v South Port Corpn* [1956] AC 218; *Playing Cards (Malaysia) Sdn Bhd v China Mutual Navigation Co Ltd* [1980] 2 MLJ 182; [1980] 1 LNS 57 (FC)). (Emphasis added.)

[16] In another recent Federal Court decision in *Samuel Naik Siang Ting v Public Bank Bhd* [2015] 6 MLJ 1; [2015] 8 CLJ 944, which was referred to by the defendant in its written submissions, Ramly Ali FCJ held instructively as follows:

[29] It is a cardinal rule in civil litigation that parties are bound by their pleadings and are not allowed to adduce facts and issues which they have not pleaded (see: *State Government of Perak v Muniandy* [1986] 1 MLJ 490; [1985] 1 LNS 117 and *Anuar bin Mat Amin v Abdullah bin Mohd Zain* [1989] 3 MLJ 313; [1989] 1 LNS 74). In *Blay v Pollard and Morris* [1930] 1 KB 628, Scrutton LJ ruled that: 'Cases must be decided on the issues on the record; and if it is desired to raise other issues

there must be pleaded on the record by amendment'.

[30] The Supreme Court in *Lee Ah Chor v Southern Bank Bhd* [1991] 1 MLJ 428; [1991] 1 CLJ 667; [1991] 1 CLJ Rep 239, had also emphasised the importance of pleadings and ruled that where a vital issue was not raised in the pleadings it could not be allowed to be argued and to succeed on appeal (see also *Ambank (M) Bhd v Luqman Kamil Mohammed Don* [2012] MLJU 56; [2012] 3 CLJ 551 (FC)).

[31] On the same issue, HRH Raja Azlan Shah FJ (as HRH then was) in *The Chartered Bank v Yong Chan* [1974] 1 MLJ 157; [1974] 1 LNS 178, had also pointed out that 'as the trial judge had decided on an issue which was not raised in the pleadings, the judgment must be set aside and new trial ordered' (see also: *Haji Mohamed Dom v Sakiman* [1956] 1 MLJ 45; [1955] 1 LNS 26 and *Kiaw Aik Hang Co Ltd v Tan Tien Choy* [1964] 1 MLJ 99; [1963] 1 LNS 59).

[17] As such, it cannot be emphasised enough that parties are bound by their pleadings and any departure must be accompanied by an amendment to the original pleadings. Thus if the amendment application is allowed, the objection against the need to adhere to matters specifically pleaded would fall away, since the pleadings would be amended to include such matters previously unpleaded.

[18] The leading Federal Court decision in *Yamaha Motor Co Ltd v Yamaha Malaysia Sdn Bhd & Ors* [1983] 1 MLJ 213 was also referred to by the plaintiff, for the often-cited ruling that amendments should be considered favourably if the application is made in good faith, the amendments would not change the character of the suit and whether prejudice to the other party, if any, could be compensated by costs.

[19] But the plaintiff did not refer to the more relevant and recent Federal Court decision in *Hong Leong Finance Bhd v Low Thiam Hoe and another appeal* [2016] 1 MLJ 301. In that case, the defendant had already filed his defence and counterclaim and the case had proceeded through five pre-trial case management sessions. After the matter was fixed for trial, the defendant filed an application to amend the defence, by introducing two new and distinct defences.

[20] The High Court found that there was a gross delay in the filing of the application and that there was no credible explanation for the delay. In addition it was also found that the amendment would prevent the trial from proceeding. The Court of Appeal reversed the decision of the High Court. The Federal Court then allowed the appeal by the plaintiff. The headnotes of the judgment delivered by Zulkefli CJ (Malaya) (now PCA) stated thus:

(1) *Yamaha Motor* was decided under the Rules of the High Court 1980. However, now under O 34 of the Rules of Court 2012, the progress of the case was no longer left in the hands of the litigants but with the court in the driver's seat. Courts in

Malaysia had consistently held that where there was a delay in making an amendment application, the onus was on the applicant to furnish a reasonable explanation for such as delay and this was in effect an additional factor to the *Yamaha Motor*'s rules. In the present case, there had been five case managements since 2011 and there had been no indication at all that an amendment application was contemplated by the defendant. The only explanation given by the defendant in his affidavit for the delay was that he had only discovered that these two new issues were not pleaded when preparing for trial. Such an explanation could not be acceptable. In the circumstances, the Court of Appeal fell into an error of law when it applied the principles in *Yamaha Motor* without appreciating that those principles by themselves were insufficient to deal with an application to amend, which introduced two new defences on the eve of a trial. The Court of Appeal had also failed to appreciate that the defendant had to bear the burden of producing material and cogent reasons to explain why the change was sought so late (see paras 18, 25, 27, 29 & 33).

NO SURPRISE NOR PREJUDICE

[21] It is, in the instant case before me, the primary contention of the defendant that the plaintiff had failed to provide any reasonable explanation for the delay in its application to amend its pleadings. This assertion is not without basis. Nothing has been stated in the affidavits in support of this application as to why the plaintiff decided to take this course of action only at this stage, and not earlier when the objection was first raised.

[22] Is this fatal to the amendment application? After a careful examination of the circumstances and justice of the case, I ruled in the negative. At the hearing, counsel for the plaintiff agreed that the amendment application came late in the day, but maintained that the law as set out in O 20 r 5(1) of the RC 2012 envisages that leave could still be given for amendment to pleadings applied for at any stage of the proceedings, and that the decision whether or not to allow amendment is eminently within the discretion of the trial judge considering the circumstances of the case.

[23] It should be stated that an important reason for the decision in *Hong Leong Finance*, as mentioned in the passage reproduced earlier is the introduction of the new RC 2012, in respect of which, it is worthy of emphasis, that Zulkefli CJ (Malaya) (now PCA) had also instructively held as follows:

[18] ... Nowadays the court recognises especially under the new case management regime that a different approach needs to be taken to prevent delay in the progress of a case to trial and for its completion. The progress of the case is no longer left in the hands of the litigants but with the court in the driver's seat (see the case of *Syed Omar bin Syed Mohamed v Perbadanan Nasional Bhd* [2013] 1 MLJ 461; [2012] 9 CLJ 557). In particular when an application to amend the pleading is made at a very late stage as was done in the present case, the principles in *Yamaha Motor* ought not to be the sole consideration. This is because an order for compensation by payment

of costs in such a case may not be an adequate remedy and it would also disrupt the administration of justice which affects the courts, the parties and the other users of the judicial process (see the case of *Conlay Construction Sdn Bhd v Perembun (M) Sdn Bhd* [2014] 1 MLJ 80).

[24] The imperative of meeting the objective of the RC 2012 in ensuring timely disposal of cases is further highlighted by His Lordship in the following passages of the judgment:

> [26] It is to be stated here the requirement that a cogent explanation for such a delay must be furnished when making a late application to amend would be clearly in line with pre-trial case management procedures (introduced in year 2000). The management of cases by the courts prior to the trial is intended to ensure 'just, expeditious and economical disposal' of an action (see O 34 r 4(1) of the RHC 1980, now O 34 r 1(1) of the RC 2012) and the Practice Direction No 2 of 2014 issued by the Chief Judge of High Court in Malaya). Timely disposal of cases and the limitation of cost are now the primary considerations under the present regime.
>
> [27] In our instant case, there had been five case managements since 2011 and there was no indication at all that an amendment application was contemplated by the defendant. The only explanation given by the defendant in his affidavit for the delay was that he had only discovered that these new issues were not pleaded when preparing for trial. Such an explanation in our view surely cannot be acceptable.

[25] The application in the instant case before me is not one made before trial. But this is not to suggest that an application after trial has commenced is less objectionable than one before trial starts. Far from it. It must instead surely depend on the circumstances and facts of each case. But the important point is that there is absolutely no issue of the amendment application delaying the trial for it has started and even concluded. There could be a slight delay in that my decision on the amendment application should first be made before I give the decision on the main suit; but otherwise, the risk of the trial being delayed or postponed did not arise.

[26] Thus in the circumstances of the case, the factor of time of application alone cannot, even in the absent of a cogent reason for the delay in making the application, without more, be a basis to decline the request, unless mala fide is shown. But none is shown by the defendant.

[27] It is to be observed regardless that as submitted by the defendant, there is a distinction between an amendment application made before trial commences and one after conclusion of one. The latter, like the situation presently, could be said to confer on the apparently unsuccessful party who is seeking the amendment, an unfair opportunity to renew its claim against his opponent on the basis of an entirely new or different set of previously unpleaded facts (see the Court of Appeal decision in *Pfizer Ireland*

Pharmaceuticals v Ranbaxy (M) Sdn Bhd [2013] 3 MLJ 703; [2013] 2 CLJ 61). In this sense, the ground for the amendment concerning the need to strengthen the overall claim of the plaintiff, as stated by the plaintiff, as referred to earlier, is patently misconceived.

[28] But in the instant case, the alleged unpleaded issues (particularly on the duty to supply slop oil) had been raised by the plaintiff to its own and to the defendant's witnesses. They all gave their versions of responses to those issues. And the defendant's counsel had in response cross-examined the plaintiff's witnesses on their replies to those issues, as did learned counsel for the defendant's own witnesses, in re-examination.

[29] In my observation, it became increasingly clearer, as the trial progressed, and as more testimonies were heard, that an especially key issue of controversy or primary bone of contention between the parties is the alleged failure of the defendant to supply slop oil to the plaintiff in violation of the JVA. All the relevant witnesses were asked questions on this, by both the counsel for the parties. It is the real question in controversy between the parties, and whilst bearing in mind the prevailing law as enunciated in *Hong Leong Finance*, it is nevertheless not for the courts to punish the mistakes of the parties in the proceedings by disregarding this important question and rejecting the amendment application.

[30] It would not be in the interest of justice that the true issue of controversy be disregarded by this court only on account of it being unpleaded as alleged by the defendant. Even though the issue was not specifically stated in the *list of issues to be tried* filed by the parties, the issue had in fact been raised and dealt with extensively by the answers given by most of the witnesses. In the exercise of my discretion to consider this amendment application, I must not only consider whether the amendment would cause injustice to the defendant, but more critically, also determine whether in the circumstances of this case, it is just for me to grant leave.

[31] After all, the crux of the case of the plaintiff as presently pleaded is the alleged breach of the JVA by the defendant, principally by reason of the latter's unlawful termination of the lease and the JVA, by having failed to maintain the infrastructure on the land to ensure proper operations of the slop oil facility managed by the plaintiff, failed to perform any marketing of the business, and for having refused entry to the plaintiff to the land, despite the plaintiff having expended much on machinery and development of the facility.

[32] Thus, even though the defendant argued that the plaintiff did not state specifically the obligation of the defendant to deliver slop oil to the plaintiff in its statement of claim, it cannot be denied that it is a key term of the JVA that

as part and parcel of and consistent with the contractual arrangement between the parties, where the defendant provided the land and related infrastructure to enable the plaintiff to build and operate the slop oil treatment facility, it was clearly agreed that the plaintiff was to treat slop oil received from the defendant under the JVA, as indeed stipulated under cl 1.2 therein.

[33] As such, I do not think that the defendant can be said to be genuinely prejudiced by the amendment now sought to be introduced. Even without a pleading on that specific clause, the thrust of the obligations of the defendant in the JVA included its alleged duty to deliver slop oil, which was the very subject matter of slop treatment facility business envisaged in the JVA. There is no new cause of action. There is no transformation of the character of the suit. It is still very much about the alleged breach of the JVA. And the JVA itself has been specifically pleaded. Neither has bad faith been shown. I agree the tardiness of the plaintiff in moving this application is far from laudatory. But this does not, without more, amount to bad faith.

[34] In this regard, I can thus do no better than make reference to the following often-quoted passages from the judgment of Raja Azlan Shah CJ (Malaya) (as his Highness then was) in the Federal Court decision in *KEP Mohamed Ali v KEP Mohamed Ismail* [1981] 2 MLJ 10:

> In the present case, the material facts relating to the acknowledgement was not pleaded in the statement of claim; it was also not pleaded in the reply apart from stating that the law of limitation does not apply to the present action. That in our opinion is bad pleading. But it is a matter of indifference to the court whether the plea of acknowledgement is pleaded in the statement of claim or in the reply. If it is raised in the statement of claim, it would make a reply unnecessary and so reduce costs. A further advantage of pleading an acknowledgement in the statement of claim is that the defendant may thereby be led to refrain from raising the issue of limitation in the defence, thus narrowing the area of discovery and reducing costs: see *Bullen & Leake* (12th Ed) at p 638. Since the material facts and circumstances were not pleaded in the statement of claim, it should have been pleaded in the reply. *Be that as it may, this aspect of the case has been satisfactorily presented and developed in the proceedings before the High Court and we think there are materials on the record from which a decision to that effect could be arrived at. As one of the objects of modern pleadings is to prevent surprise, we cannot for one moment think that the defendant was taken by surprise. To condemn a party on a ground of which no material facts have been pleaded may be as great a denial of justice as to condemn him on a ground on which his evidence has been improperly excluded.* (Emphasis added.)

[35] Similarly in the instant case, I did not think the defendant was truly taken by surprise. Even if it were, probably at the early stage when the issue had been first raised by the plaintiff and objected to by the defendant, the issue was subsequently dealt with by the witnesses in their answers such that it could be certainly said that it had been 'satisfactorily presented and developed in the

proceedings'. Exclusion of the testimony of the various witnesses on this issue by dismissing this application would in my judgment constitute a greater injustice to the parties and does little to promote the ends of justice.

[36] The situation would in my view be somewhat, if not entirely different if the application was made after the conclusion of trial because it could in that event be said that even though the defendant had been able to cross-examine and re-examine witnesses on the issue, the defendant did not have the knowledge that the plaintiff sought to formally apply to amend its pleadings. In that situation, the defendant could argue that if it had known or that if the application had been made before the conclusion of trial, the defendant could have exercised its right to recall witnesses or even to call new witnesses to deal with the issue.

[37] But as it turned out, the plaintiff did apply before the end of trial, and the defendant was contented with the examination of the witnesses without making any application to recall witnesses who have been released or call new ones.

[38] In a situation where an objection on a matter said to be unpleaded is made and recorded, the fact that upon the exercise of judicial discretion, no ruling is made by the trial judge at that juncture whether to allow or disallow until after conclusion of the trial upon submission of the parties, which I believe is not uncommon, the objecting party, in this adversarial system of ours, certainly should not assume that the objection will be eventually sustained and not take steps during the course of trial in response thereto, in order to address the alleged unpleaded issue by having the same rebutted by witnesses, including by seeking to call new ones or by tendering new documents.

[39] This would be expected of the objecting party if the alleged unpleaded issue had turned into one of the real questions in controversy, as indeed was the situation in the instant case, where it became crystal clear, at the latest, definitely by the close of the plaintiff's case, in that the issue had become one of considerable importance in the proceedings.

[40] This is not to suggest that the defendant did not in this case take steps to counter the alleged unpleaded issue. The defence counsel had in fact reacted admirably in this regard by her meticulous examination and re-examination on virtually each and every answer given by the witnesses touching on this issue, as she indeed did on most other issues. In short, I do not think the defendant truly additionally intended to recall or call any other witnesses or introduce any new documents to deal with the alleged unpleaded issues especially when I had permitted the tendering of documents not in the bundle, and as a result, where

A appropriate, the recall of witness in the course of trial. The defendant could have done so before the end of trial and in truth decided it did not have to.

[41] Any suggestion on the part of the defendant, as indeed averred in the affidavit in reply by the defendant's managing director to the plaintiff's application herein that the amendment would result in the introduction of a new issue necessitating the calling of witnesses would in my view, considering the circumstances of this case as I have just described, be unconvincing and lacking in substance. No prejudice would thus be occasioned to the defendant if the amendment is allowed. Neither would it be unjust if it is allowed.

[42] The Federal Court in *Hong Leong Finance* further held that the principles of *Yamaha Motor* should not be the sole consideration when an application to amend is made at a very late stage. The Federal Court then listed the following factors for consideration:

(a) when dealing with an application to amend the pleadings, which introduce new case in the claim or defence, on the eve of the trial, the principles of *Yamaha Motor* are not the sole considerations;

(b) the principles in *Yamaha Motor* applies to cases where the application to amend pleadings is made at an early stage of the proceedings;

(c) that there has to be cogent and reasonable explanation in the application's affidavit as to why the application was filed late;

(d) that the application to amend the pleadings is not a tactical manoeuvre;

(e) that the proposed amendment must disclose full particulars for the court to ascertain if there is a real prospect of success in proving the same; and

(f) that lateness in the application to amend the pleadings cannot necessarily be compensated by costs.

[43] As I have stated, in the instant case, the lateness in the making of the amendment application is not in the context of the stage just before commencement of trial which would otherwise have the effect of potentially delaying trial and frustrating the objective of O 34 of the RC 2012 to achieve the just, expeditious and economical disposal of cases. The delay was well after commencement of trial.

[44] On the one hand, there would be a concern on the advantage to the plaintiff that could work unfairly against the defendant as observed above. But on the other hand, there is no real risk of postponement of trial. As such, in the instant case, the concern on the advantage to the plaintiff must be examined

against the backdrop of the progress of the proceedings in order to determine if there is any real prejudice to the defendant, and whether it is just for the application to be allowed.

[45] As I stated, the issue alleged to be unpleaded has been satisfactorily presented and developed in the nature observed in *KEP Mohamed Ali*, with sufficient materials on the issue now available before the court based on the testimony of and documents tendered by various witnesses that in my assessment, militates against the finding of prejudice to the defendant.

[46] Additionally, the following observation of the Federal Court in *Karuppannan a/l Ramasamy & Anor v Elizabeth Jeevamalar Ponnampalam & Ors (Sundaram a/l Marappa Goundan & Anor, interveners and Raya Realti, third party) and another appeal* [2010] 1 MLJ 156 is no less relevant:

> [37] Nevertheless, in our judgment, the learned trial judge was right in not paying heed to this pleading issue, and we do not agree with the Court of Appeal that he had misdirected himself in this respect. The purpose of a pleading is to enable the other party to know the precise case that he has to meet. A defect in a pleading that does not catch the other party by surprise or embarrass or prejudice him ought not to bring harm to the case of the party pleading. In this case, as we have shown, the plaintiffs' failure to plead the option did not embarrass or prejudice the six defendants in any way. From the very outset they knew that it was the second option that was the true basis of the plaintiffs' claim. This is nothing but a trivial issue.

THE ISSUE OF SLOP OIL SUPPLY IS ALREADY PLEADED

[47] The other reason for my allowing the amendment application is that a careful review of the pleadings would readily reveal that the issue of the alleged failure in the supply of slop oil by the defendant is in actuality not entirely absent from the pleadings of the plaintiff. This contention was not highlighted even by the plaintiff but the fact is, it was already stated in para 4.3(viii) of the statement of claim that the defendant was to undertake marketing activities for the slop oil business and in para 13.3 that the defendant had failed to do any such activities.

[48] Much more directly, para 10.2 of the plaintiff's reply to the defence specifically, and in unmistakable terms, stated that the defendant had failed in its obligation to supply slop oil. It reads thus:

> The Defendant at the time of entering the said Agreement had represented to the Plaintiff that the Defendant would obtain at least 20,000 cubic meters of slop oil per month to process. Based on that representation, Plaintiff has expended over RM6 million to set up the plant. When the plant was ready and operational, *the Defendant failed in its obligation to supply or find suitable suppliers of 20,000 cubic meters of slop oil or at all.* (Emphasis added.)

[49] A reply to defence is also part of pleadings under O 18 of the RC 2012. In any event, surely, this averment in the statement of reply by the plaintiff to the defence of the defendant puts paid to any argument by the defendant that the latter had been caught by surprise or in any fashion prejudiced by the questions on the slop oil supply. On this basis alone, I find that the plaintiff's application is in essence merely to further clarify what has already been pleaded, and should therefore be allowed.

CONCLUSION

[50] For the above reasons, in my judgment, the plaintiff has established its case for leave be granted to amend the statement of claim, as prayed for, albeit to the extent only of the proposed inclusion of the pleadings concerning the alleged failure of the defendant to supply slop oil to the plaintiff. I therefore allow encl 88 to such effect.

Plaintiff's application allowed in part.

Reported by Mohd Kamarul Anwar